Public Prosecutor v Hii Sii Chang

HIGH COURT (SIBU) — CRIMINAL APPEAL NO 20-41-16 OF 1996
TEE AH SING J
27 JANUARY 1997

Criminal Procedure *— Prosecution — Offence under s 4A(a) of the Common Gaming Houses Act 1953 — Proceeding instituted after one year from date of commission of offence — Whether proceeding time-barred — Whether Sarawak Limitation Ordinance (Cap 49) applicable — Whether word 'suit' in ss 2 & 3 of the Ordinance includes criminal suit — Sarawak Limitation Ordinance (Cap 49) ss 2, 3 item 1 of Schedule*

The respondent was charged on 1 March 1995 for an offence under s 4A(a) of the Common Gaming Houses Act 1953 ('the Act'). The offence was alleged to have been committed on 12 October 1992. The respondent took out a preliminary objection that the said criminal proceeding was time-barred by virtue of s 3 item 1 of the Schedule to the Sarawak Limitation Ordinance (Cap 49) ('the Ordinance'). The magistrate upheld the preliminary objection and held that the word 'suit' in s 2 of the Ordinance included criminal proceedings and as the Schedule in the Ordinance provided a limitation period of one year for the criminal suit, the charge against the accused must be dismissed. The Public Prosecutor appealed. In the appeal, it was submitted that the learned magistrate erred when she held that: (i) the Ordinance applied; (ii) the charge against the respondent was to be dismissed due to the failure to prosecute within one year fom the date of the commission of the offence; and (iii) the word 'suit' in s 2 of the Ordinance included criminal suit. The Public Prosecutor further submitted that the offence under the Act was an arrest case and not a summons or civil case.

Held, allowing the appeal:

(1) The word 'suit' in s 2 of the Ordinance includes 'any action or other proceedings'. The word 'suit' and 'action' in the Ordinance connote civil proceedings and are not usually used to describe criminal proceedings. The words 'or other proceeding' had a meaning ejusdem generis with the word 'suit' or 'action' to mean other civil proceedings whatsoever. The Ordinance does not deal with criminal proceedings and the word 'suit' in ss 2 and 3 of the Ordinance does not include criminal proceedings and criminal suits (see p 255A–B, F).

(2) The punishment for an offence under s 4A(a) of the Act is 'shall be liable to a fine of not less than RM20,000 and not more than RM200,000 and shall also be punishable with imprisonment to a term of not exceeding five years'. Therefore, this was a warrant and not a summons case. There was no breach for any bond whatsoever where a penalty was incurred nor was there any forfeiture provision. Clearly, an offence under s 4A(a) of the Act does not come within the ambit of the words 'upon a Statute,

Act, Regulation or by-law, for a penalty or forfeiture' as contained in item 1 of the Schedule. It would be wrong to construe the word 'suit' in ss 2 and 3 of the Ordinance as a provision which laid down a time frame for the institution of criminal proceedings (see pp 256I and 257A).

[**Bahasa Malaysia summary**

Penentang dipertuduhkan pada 1 Mac 1995 untuk satu kesalahan di bawah s 4A(a) Akta Rumah Judi Terbuka 1953 ('Akta tersebut'). Kesalahan tersebut dikatakan telah dilakukan pada 12 Oktober 1992. Penentang memfailkan bantahan permulaan bahawa prosiding jenayah tersebut dihalang oleh had masa memandangkan s 3 perkara 1 Jadual kepada Ordinan Had Masa Sarawak (Bab 49) ('Ordinan tersebut'). Majistret membenarkan bantahan permulaan itu dan memutuskan bahawa perkataan 'guaman' dalam s 2 Ordinan tersebut termasuk prosiding jenayah dan oleh kerana Jadual kepada Ordinan tersebut memperuntukkan had masa satu tahun bagi guaman jenayah, pertuduhan terhadap tertuduh mesti digugurkan. Pendakwa Raya membuat rayuan. Dalam rayuan itu, adalah dihujahkan bahawa majistret telah membuat kesilapan apabila beliau memutuskan bahawa: (i) Ordinan tersebut terpakai; (ii) pertuduhan terhadap penentang mesti digugurkan kerana kegagalan untuk mendakwa dalam masa satu tahun daripada tarikh kesalahan dilakukan; dan (iii) perkataan 'guaman' dalam s 2 Ordinan tersebut termasuk guaman jenayah. Pendakwa Raya selanjutnya berhujah bahawa kesalahan di bawah Akta tersebut adalah satu kes tangkap dan bukannya kes saman atau sivil.

Diputuskan, membenarkan rayuan:

(1) Perkataan 'guaman' dalam s 2 Ordinan tersebut termasuk 'apa-apa tindakan atau lain-lain prosiding'. Perkataan 'guaman' dan 'tindakan' dalam Ordinan tersebut membawa konotasi prosiding sivil dan biasanya bukan digunakan untuk menerangkan prosiding jenayah. Perkataan-perkataan 'atau lain-lain prosiding' mempunyai makna ejusdem generis dengan perkataan 'guaman' atau 'tindakan' untuk memberi maksud apa saja prosiding sivil. Ordinan tersebut tidak berkaitan dengan prosiding jenayah dan guaman jenayah (lihat ms 255A–B, F).

(2) Hukuman bagi kesalahan di bawah s 4A(a) Akta tersebut ialah 'denda tidak kurang daripada RM20,000 dan tidak lebih daripada 200,000 dan juga akan dihukum dengan pemenjaraan untuk tempoh masa tidak melebihi lima tahun'. Oleh itu, ini adalah kes waran dan bukannya kes saman. Tidak ada pelanggaran apa-apa bon di mana penalti dikenakan atau pun peruntukan perlucuthakan. Adalah jelas bahawa satu kesalahan di bawah s 4A(a) Akta tersebut tidak termasuk dalam rangkuman perkataan-perkataan 'ke atas Statut, Akta, Peraturan atau undang-undang kecil, untuk satu penalti atau perlucuthakan' seperti yang

terkandung dalam perkara 1 Jadual. Adalah salah untuk mentafsirkan perkataan 'guaman' dalam ss 2 dan 3 Ordinan tersebut sebagai satu peruntukan yang menetapkan had masa bagi memulakan prosiding jenayah (lihat ms 256I dan 257A).]

Notes

For cases on prosecution, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2005–2047.

Cases referred to

Charles Bradlaugh v Henry Lewis Clarke 8 AC 354 (refd)
Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor [1981] 1 MLJ 254 (refd)
PP v Chin Keow [1947] MLJ 55 (refd)
Stewart v Stewart [1952] MLJ 211 (refd)
W & M Wood (Haulage) Ltd v Redpath [1966] 3 WLR 526 (refd)

Legislation referred to

Common Gaming Houses Act 1953 s 4A(a)
Criminal Procedure Code (FMS Cap 6) s 404
Food Act 1983 s 19(2)
Limitation Act 1953
Modification of Laws (Declaration of Present Laws) (Sarawak) Order 1965
Sarawak Limitation Ordinance (Cap 49) ss 2, 3
Sarawak Criminal Procedure Code (Cap 58) s 314 (repealed)
Sarawak Customs Ordinance (Cap 26) 118(1) (repealed)
Trade Descriptions Act 1972 s 19(1)
Code of Criminal Procedure 1973 s 468(1) [Ind]
Limitation Act 1908 [Ind]

Ahmad Zubir bin Jantan (Deputy Public Prosecutor) for the appellant.
Arthur Lee Cheng Chuan (*Arthur Lee Lin & Co*) for the respondent.

Cur Adv Vult

Tee Ah Sing J: This is an appeal by the Public Prosecutor against the order of the learned magistrate at Sibu made on 28 October 1995 whereby the charge against the respondent under s 4A(a) of the Common Gaming Houses Act 1953 ('the Act') was dismissed and the respondent was discharged.

The charge against the respondent was as follows:

> That you, on 12 October 1992 at about 3.30pm at Sibu Labours Association, No 9, 1st floor, Channel Road, Sibu in the State of Sarawak did assist in carrying on public lottery, to wit, illegal four-digit lottery and that you thereby committed an offence punishable under s 4A(a) of the Common Gaming Houses Act 1953.

According to the appeal record, the respondent was first charged in court on 1 March 1995. A

The respondent took a preliminary objection that the criminal proceeding was time-barred by virtue of s 3 item 1 of the Schedule to the Sarawak Limitation Ordinance (Cap 49) ('the Ordinance'). The learned magistrate in her ruling (at pp 16 and 17 of the record of appeal) said: B

> I agree with learned defence counsel that the said 'suit' in s 3 of the Ordinance includes criminal suit. The charge against the accused in our present case which is under s 4A(a) of the Common Gaming Houses Act 1953 is also a criminal suit. Since the Schedule in the Ordinance provides the limitation period of one year for criminal suit and the accused in our present case was charged for an alleged offence said to be committed on 12 October 1992 and he was first charged in court on 1 March 1995 — which is about three years' lapse — I rule that the charge against the accused be dismissed. C

The learned Deputy Public Prosecutor ('the DPP') submitted that the learned magistrate erred when she held that the Ordinance applied. D The second error that the learned magistrate made was that she ruled the charge against the respondent be dismissed because of the failure of the prosecution to institute the charge within a period of one year. And the third error that the learned magistrate made was when she ruled that 'suit' in s 3 of the Ordinance includes criminal suit. E

The DPP submitted that the respondent was charged under s 4A(a) of the Act which is an arrest case. It is not a summons case or a civil case.

In argument, the following cases were cited:

(i) *Jumatsah bin Daud & Anor v Voon Kin Kuet & Anor* [1981] 1 MLJ 254; F

(ii) *Stewart v Stewart* [1952] MLJ 211; and

(iii) *PP v Chin Keow* [1947] MLJ 55.

Learned counsel for the respondent submitted that the Ordinance was declared to be federal law by virtue of the Modification of Laws (Declaration of Present Laws) (Sarawak) Order 1965 — FLN 200 of 1965. G

The history of the Ordinance can be traced back to the Indian Limitation Act of 1908. This is because the format of the Ordinance mirrors (except for certain specific provisions) that said Limitation Act. The principles of limitation of the Limitation Act 1953 that are applicable H to West Malaysia and which are essentially based on the predecessor to the present English Limitation Act are totally different.

It is submitted that 'suit' as defined in s 2 of the Ordinance is statutorily defined as 'any action or other proceedings'. An examination of the preamble to the Ordinance clearly shows that it is an ordinance to I regulate the limitation of suits.

It was submitted that the word 'suit' includes criminal suit or criminal proceedings. In support, the following references were cited:

(i) *Concise Oxford Dictionary of Current English*;

(ii) *Webster's Encyclopedia Unabridged Dictionary of the English Language*;

(iii) *Roget's Thesaurus of English Words and Phrases*;

(iv) *Stroud's Judicial Dictionary* (4th and 5th Editions);

(v) *Osborn's Concise Law Dictionary*; and

(vi) *Barron's Law Dictionary*.

It was also submitted that in 2 *Halsbury's Laws of England* (4th Ed) (para 98), the learned author pointed out that various periods of limitation after an offence is committed are provided by statute for the commencement of proceedings. *Law of Criminal Procedure* by SC Sarkar (6th Ed) at pp 1236–1237 and 1242 was also cited.

It was submitted that an examination of the Ordinance does not show that it is limited to civil matters. Item 1 of the Schedule to the Ordinance is explicit. Where there is a suit under a statute, Act, regulation or by law, for a penalty or forfeiture (of which the charge against the respondent would fall squarely in), the period of limitation as laid in the third column of the Schedule is one year and the time from which period begins to run as laid in the fourth column is when the penalty or forfeiture is incurred. It is humbly submitted that the penalty is incurred upon the commission of the alleged offence.

In this case, this is alleged in the charge sheet to be on 12 October 1992. As such, limitation would have set in by 11 October 1993 and a prosecution taken on 1 March 1995 is most definitely out of time.

Learned counsel for the respondent further submitted that it is accepted judicial view for limitation to be applied in criminal cases. In *W & M Wood (Haulage) Ltd v Redpath* [1966] 3 WLR 526, the English court held that the word 'proceedings' in s 1(3) of the English Evidence Act 1938 included both civil and criminal proceedings. In *PP v Chin Keow*, the Court of Appeal held that proceedings under ss 250 and 251 of the Land Code are criminal in nature.

In *Stewart v Stewart*, the learned judge held that applications by wives for maintenance were made under the old procedure by summons to show cause on the criminal side.

He also cited the case of *Charles Bradlaugh v Henry Lewis Clarke* 8 AC 354, which held that it is a principle of statutory interpretation that all penalties imposed by statute belong to the Crown alone. It was submitted that the words used by the Earl of Selborne LC quite clearly indicate that the word 'suit' (at p 360) as a generic term includes criminal suit.

It was submitted that limitation does apply to all criminal prosecution as it was the intention (at the relevant time of the passing of the Ordinance) of the legislature.

I shall now deal with the contentions of the parties.

Section 468(1) of the Indian Code of Criminal Procedure 1973, imposes a bar in taking cognizance of an offence after the expiry of the period of limitation mentioned in sub-s (2).

Section 468 of the Indian Code of Criminal Procedure 1973 reads as follows:

> Bar to taking cognizance after lapse of the period of limitation
>
> (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in subsection (2) after the expiry of the period of limitation.
>
> (2) The period of limitation shall be —
>
> (a) six months, if the offence is punishable with fine only;
>
> (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;
>
> (c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

In Sohoni's *The Code of Criminal Procedure* (19th Ed, 1973) Vol 5, the learned author at p 5212 stated that:

> No limitation is prescribed for offences punishable with imprisonment exceeding three years or with punishment of any other kind, such as death. There shall, therefore, be no limitation for the taking of cognizance of such offences.

As such, I am of the view that the passages in *The Law of Criminal Procedure* by SC Sarkar (6th Ed) at pp 1237 and 1242 and the passage (para 98) of *Halsbury's Laws of England* (4th Ed) on periods of limitation are not relevant to this appeal. For example, some of our statutes lay down special limitation periods in criminal cases.

Time bar for criminal proceedings can, inter alia, be found in the following Acts:

(a) Section 19(1) of the Trade Descriptions Act 1972 reads as follows:

> No prosecution for an offence under this Act shall commence after the expiration of —
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> (a) three years from the commission of the offence; or
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> (b) one year from its discovery by the prosecutor,
>
> whichever is the earlier:
>
> Provided that it shall not be a bar to the commencement of a prosecution for an expiry of the period specified in the above paragraph (b) if the Public Prosecutor certifies in writing that the accused by his own conduct contributed to the delay in the commencement of the prosecution.

(b) Section 19(2) of the Food Act 1983 provides as follows:

> Where any food has been purchased or procured from any person for analysis or examination, no proceedings in respect of the sale thereof or of any offence against this Act shall be instituted after the expiration of ninety days from the time of purchasing or procuring that food.

In the Act, there is no time limit for prosecution of offences under the Act. And the Act applies to Sarawak with effect from 15 April 1992.

Section 3 of the Ordinance reads as follows:

A Subject to sections 4 to 24 inclusive, every suit instituted after the period of limitation prescribed therefor by the schedule, if limitation has been set up as a defence shall, be dismissed.

In s 2 of the Ordinance, 'suit' includes any action or other proceedings.

Item 1 of the Schedule reads as follows:

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Schedule

(Sections 3 and 6 (1))

Particulars of the Limitations applicable to each class of proceeding

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1st Column	2nd Column Description of Suit	3rd Column Period of Limitation	4th Column Time from which period begins to run
	Part I — One Year		
D 1	Upon a Statute, Act, Regulation or By-law, for a penalty or forfeiture	One year	When the penalty or forfeiture is incurred

E The preamble to the Ordinance reads as follows: 'An Ordinance to regulate the limitation of suits'.

The words 'suit' and 'action' seem to me to connote civil proceedings. They are not usually used to describe criminal proceedings. And the words 'or other proceeding' have a meaning ejusdem generis with the words 'suit' F and 'action' to mean other civil proceedings whatever.

Therefore I am of the view that the Ordinance does not deal with criminal proceedings. I am of the view that the word 'suit' in ss 2 and 3 of the Ordinance does not include criminal proceedings or criminal suit.

Further, the court also has to construe the meaning of the words 'for G a penalty or forfeiture' in item 1 of the Schedule.

I shall now cite s 118(1) of the repealed Sarawak Customs Ordinance (Cap 26) and s 314 of the repealed Sarawak Criminal Procedure Code (Cap 58) for the purpose of illustrating the meaning of the words 'for a penalty or forfeiture' in item 1 of the Schedule to the Ordinance.

H Section 118(1) of the Sarawak Customs Ordinance (Cap 26) which has been repealed reads as follows:

> If there be no prosecution with regard to any goods seized under this Ordinance, such goods shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure, unless a claim thereto is made before that date in the manner hereinafter set forth.

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So under this section if the owner of goods seized did not make a claim within one month, the goods seized are deemed to be forfeited at the expiration of one calendar month from the date of seizure. Therefore, if

the owner of the goods seized intends to bring a suit against the customs authorities against the forfeiture, then the owner must file the suit within one year when the forfeiture is incurred pursuant to item 1 of the Schedule to the Ordinance.

Section 314 of the Sarawak Criminal Procedure Code (Cap 58) which has been repealed by Act A324/76 with effect from 9 January 1976 reads as follows:

> (1) Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken or, when the bond is for appearance before a Court, whenever it is proved to the satisfaction of such Court that such bond has been forfeited, the Court shall record the grounds of such proof and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid.
>
> (2) If sufficient cause is not shown and the penalty is not paid the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the property belonging to such person.
>
> (3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it, and it shall authorize the distress and sale of any property belonging to such person without such limits when indorsed by a Magistrate within the local limits of whose jurisdiction such property is found.
>
> (4) If such penalty be not paid, and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the Court which issued the warrant, to imprisonment for a term which may extend to six months.
>
> (5) The Court may, in its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

Mallal's Criminal Procedure (4th Ed), on a commentary on s 416 of the Colony Code — which is in pari materia with s 404 of the Criminal Procedure Code (FMS Cap 6) and s 314 of the Sarawak Criminal Procedure Code — at p 557 stated:

> The proceeding to realize a penalty is in the nature of civil proceedings and the person against whom it is held, is competent to give evidence on oath, in his own behalf, and also entitled to call evidence.

If the court has ordered the penalty to be paid on the forfeiture of a bond but the penalty is not paid, then the government can file a civil suit against the defaulter. The forfeiture or penalty is incurred on the day the court makes the order to pay. In such an event, I am of the view that the suit must be filed within one year when the penalty is incurred under item 1 of the schedule to the Ordinance.

The punishment for an offence under s 4A(a) of the Act is 'shall be liable to a fine of not less than RM20,000 and not more than RM200,000 and shall also be punished with imprisonment for a term not exceeding five years'. So this is a warrant case and not a summons case.

Here, there is no breach of any bond whereby a penalty is incurred. Neither is there any forfeiture provision.

A So clearly an offence under s 4A(a) of the Act does not come within the ambit of the words 'upon a Statute, Act, Regulation or By-law, for a penalty of forfeiture'. It would be wrong to construe the word 'suit' in ss 2 and 3 of the Ordinance as a provision laying down a timetable for the institution of criminal offences.

B I conclude therefore that the learned magistrate was wrong in holding that the word 'suit' in ss 2 and 3 of the Ordinance includes criminal prosecution. The learned magistrate also erred in law in coming to the conclusion that the period of limitation of one year applies.

I am of the view no limit of time is anywhere imposed by the C Ordinance within which offences can be brought in court.

I therefore allow the appeal and set aside the order and direct the learned magistrate to continue the trial.

Appeal allowed.

D Reported by Lew Chee Seong

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